

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Metropolitan Transit Authority )  
of Harris County, Texas – Acquisition )  
Exemption -- Union Pacific Railroad )  
Company’s Right to Restore Rail ) Finance Docket No. 35846 237015  
Service over Rail Banked ) 237016  
Right-of-Way in Harris, Fort Bend, ) 237017  
Austin, Wharton, and Colorado ) 237018  
Counties, Texas )

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**ENTERED**  
Office of Proceedings  
November 10, 2014  
Part of  
Public Record

Fort Bend County Toll Road )  
Authority – Acquisition Exemption – )  
Metropolitan Transit Authority )  
of Harris County, Texas’s Right to Restore Rail ) Finance Docket No. 35847  
Service over Rail Banked )  
Right-of-Way in Harris, Fort Bend, )  
Austin, Wharton, and Colorado )  
Counties, Texas )

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UNION PACIFIC RAILROAD COMPANY-- )  
ABANDONMENT--IN HARRIS, FORT BEND, ) AB-33 (Sub-No. 156)  
AUSTIN, WHARTON, AND COLORADO )  
COUNTIES, TX )

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UNION PACIFIC RAILROAD COMPANY-- )  
ABANDONMENT EXEMPTION--IN ) AB-33 (Sub-No. 253X)  
COLORADO AND WHARTON COUNTIES, TX )

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**CLARIFICATION REGARDING 49 C.F.R. § 1150.31 VERIFIED NOTICES OF  
EXEMPTION FILED BY METROPOLITAN TRANSIT AUTHORITY OF HARRIS  
COUNTY, TEXAS, AND FORT BEND COUNTY TOLL ROAD AUTHORITY AND  
JOINT PETITION TO VACATE AND REISSUE NOTICE OF INTERIM TRAIL USE  
AND CERTIFICATE OF INTERIM TRAIL USE**

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County Toll Road Authority

Dated: November 10, 2014

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The Metropolitan Transit Authority of Harris County, Texas (METRO), a non-carrier, and the Fort Bend County Toll Road Authority (FBCTRA), also a non-carrier, hereby provide this clarification regarding the verified notices of exemption filed on July 29, 2014 in Finance Docket Nos. 35846 and 35847 and the joint petition to vacate and reissue the notice of interim trail use in AB-33 (Sub-No. 253X) and the certification of interim trail use in AB-33 (Sub-No. 156).

### **BACKGROUND**

On July 29, 2014, METRO filed its verified notice of exemption for its acquisition from Union Pacific Railroad Company (UP) of the right to restore rail service (restoration right) over a rail banked right-of-way for the line between the Bellaire Branch's milepost 3.48 near Bellaire Junction in Houston, Harris County, Texas, to milepost 61.2 near Eagle Lake, in Colorado County, Texas, a distance of 57.72 miles in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Texas (the Westpark Line). The Surface Transportation Board (the STB or Board) published notice of the requested exemption in the Federal Register on Thursday, August 14, 2014. 79 Fed. Reg. 47,724 (Aug. 14, 2014). METRO's exemption became effective on August 28, 2014.

Also on July 29, 2014, FBCTRA filed its verified notice of exemption for its acquisition from METRO of the right to restore rail service (restoration right) over a rail banked right-of-way for the line between the Bellaire Branch's milepost 20, approximately 2,020 feet east of the Harris County-Fort Bend County line, to milepost 61.2 near Eagle Lake, in Colorado County, Texas, a distance of 41.2 miles in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Texas (the Subject ROW). On August 27, 2014, the Board issued a decision suspending consideration of FBCTRA's notice of exemption pending resolution of certain issues raised by

the joint request to transfer interim trail use over the Subject ROW to FBCTRA raised in the parties' filings in *Union Pacific Railroad Company--Abandonment--in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Tx*, AB-33 (Sub-No. 156), and *Union Pacific Railroad Company--Abandonment Exemption--in Colorado and Wharton Counties, Tx*, AB-33 (Sub-No. 253X) (together, the Abandonment Dockets).

Also on July 29, 2014, METRO and FBCTRA filed their joint petition to vacate and reissue the Notice of Interim Trail Use (NITU) and Certificate of Interim Trail Use (CITU) originally issued in the Abandonment Dockets. Specifically, METRO and FBCTRA requested that the Board (1) reopen the Abandonment Docket proceedings, (2) vacate the CITU issued on November 8, 2000, as modified on December 1, 2006, in AB-33 (Sub-No. 156), with respect to a portion of the subject right-of-way, under which METRO has been operating as trail user, (3) vacate the NITU issued on March 24, 2008 in AB-33 (Sub-No. 253X), under which METRO has been operating as trail user, (4) reissue a CITU in AB-33 (Sub-No. 156) to FBCTRA with respect to a portion of the subject right-of-way, and (5) reissue a NITU AB-33 (Sub-No. 253X) to FBCTRA.

#### CLARIFICATION

METRO and FBCTRA file this document to clarify their intentions regarding the above-referenced filings.

As FBCTRA discussed in its notice of exemption filing, FBCTRA is in negotiations with METRO to purchase approximately 480.59 acres of real property in Harris, Fort Bend, Austin, Wharton, and Colorado Counties, Texas (the Property). The Property includes the Subject ROW and all of METRO's rights, title, and interest in and to the Subject ROW. In connection with the contemplated total transfer of all rights, title, and interest of METRO in the Property and the

Subject ROW to FBCTRA, FBCTRA also intends to become the interim trail user over the Subject ROW through an assignment of the rail banking agreements between METRO and UP covering the Subject ROW. The intention of this transaction is to completely divest METRO of any right, title, or interest it holds in the Subject ROW.<sup>1</sup>

FBCTRA, however, will take the Property and the Subject ROW with no greater rights than METRO currently enjoys in the Property and the Subject ROW. Specifically, FBCTRA will take the Property and the Subject ROW subject to all conditions and exceptions set forth in the recorded land documents covering the Property and Subject ROW. As such, and as was referenced in FBCTRA's notice of exemption filing as well as the parties' filing in the Abandonment Proceedings, FBCTRA will take METRO's rights, title, and interest in and to the Subject ROW<sup>2</sup> and become the trail user over the Subject ROW subject to the following condition set forth in the Vesting Deeds between METRO and Southern Pacific Transportation Company (SP) and the Interim Trail Use/Rail Banking Agreements and Assignments and Deeds Without Warranty between METRO and UP:

The Property conveyed herein is expressly restricted so that, and by Grantee's acceptance of delivery of this Deed Grantee expressly covenants that, neither Grantee nor any other person or entity other than Grantor, its licensees and successors, shall have the right to use any part of the Railroad Easement or any other part of the Property for purposes of providing, or the right to hold itself out

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<sup>1</sup> Also as referenced in FBCTRA's notice of exemption filing, the parties have executed an Interlocal Agreement to provide for the development of transportation projects permitted by, and the cooperative preservation of the Subject ROW under, the National Trails System Act (Trails Act) and its implementing regulations, while providing for the transfer of ownership and control of the Subject ROW and assignment of the trail use agreement for the Subject ROW to FBCTRA.

<sup>2</sup> The *Interim Trail Use/Rail Banking Agreement and Assignment and Deed Without Warranty* states that UP conveyed to METRO "that part of the Railroad Easement upon, over, under and across the Subject Rail Corridor, together with all of Union Pacific's other rights, title and interests in and to the Subject Rail Corridor and all operating rights and other rights of use relating to the Subject Rail Corridor save and except any part of the Harris County Toll Road Property (collectively, the "**Subject Interests**"), subject to the conditions and exceptions set forth below."

as providing, freight rail operations or other railroad service provided by common carrier railroads.

*Special Warranty Deed and Grant of Easement* dated December 30, 1992 and recorded in the land records of Harris County, Texas at File No. P 023668 (corrected by File No. U 868106), the official records of Fort Bend County, Texas at Volume 2478, Page 1664, the official public records of Austin County, Texas at Volume 674, Page 858, the official records of Wharton County, Texas at Volume 43, Page 339, and the official records of Colorado County, Texas at Volume 42, Page 350.

5. Conditions and Exceptions.

This instrument is expressly made subject to the following conditions and exceptions, to-wit:

- a. the terms and conditions contained in the STB Decision;
- b. the terms and conditions of the [CITU and/or NITU] issued in the STB Decision pursuant to the Trails Act;
- c. Union Pacific hereby expressly disclaims any warranties of any kind, express or implied, as to the condition, fitness or merchantability of any equipment or appurtenances which may have been installed upon, across or within the Subject Interests;
- d. Union Pacific reserves and retains unto itself, its successor and assigns, the following interests reserved in the Vesting Deed: ... **the right to enforce the restrictive covenant set forth in the Vesting Deeds prohibiting the use of the Railroad Easement for freight service except with the prior written consent of Union Pacific.**

*Interim Trail Use/Rail Banking Agreement and Assignment and Deed Without Warranty* dated May 31, 2001 and recorded in the official records of Harris County, Texas at File No. V119623 on June 19, 2001, the official public records of Fort Bend County, Texas at F.B.C. 2001055353 on June 20, 2001, the official public records of Austin County, Texas at File No. 013510 on June 20, 2001, the official records of Wharton County, Texas at Volume 416, Page 517 on June 20, 2001, and the official records of Colorado County, Texas at Volume 374, Page 180 on June 20,

2001 (emphasis added); *Interim Trail Use/Rail Banking Agreement and Assignment and Deed Without Warranty* dated December 18, 2008 and recorded in the official records of Wharton County, Texas at Book 772, Page 701 on February 12, 2009 and the official records of Colorado County, Texas at Vol. 611, Page 836 on February 12, 2009 (emphasis added).

METRO thus acquired the rights referenced in its notice of exemption subject to the restrictive covenant set forth in the Vesting Deeds and confirmed in the Interim Trail Use/Rail Banking Agreements and Assignments and Deeds Without Warranty. Furthermore, subject to Board approval, FBCTRA will acquire all of METRO's rights in and to the Subject ROW and become the interim trail user over the Subject ROW subject to that same restrictive covenant.

Additionally, the parties note that the right of restoration acquired by METRO and intended to be transferred to FBCTRA is not an exclusive right. As the Board discussed in *King County, Wash.—Acquisition Exemption—BNSF Railway*, STB Finance Docket No. 35148 (STB served Sept. 18, 2009) (King County),

[t]he Trails Act preserves established railroad ROWs for future reactivation of rail service by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. 1247(d); Citizens Against Rails-To-Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001) (Citizens Against Rails-To-Trails). The statute expressly provides that, because such interim use is subject to restoration or reconstruction for railroad purposes, “such interim use shall not be treated, for [any] purposes . . . as an abandonment . . .” 16 U.S.C. 1247(d). Instead, the right-of-way is “railbanked,” which means that the abandoning railroad, here BNSF, is relieved of the current obligation to provide service over the line but that the railroad – or any other approved rail service provider – may reassert control to restore service on the line in the future. See Birt v. STB, 90 F.3d 580, 583 (D.C. Cir. 1996); R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Construction and Operation Exemption—In Clearfield County, PA, STB Finance Docket No. 35116 (STB served July 27, 2009) (R.J. Corman); Iowa Power—Const. Exempt.—Council Bluffs, IA, 8 I.C.C.2d 858, 866-67 (1990) (Iowa Power); 49 CFR 1152.29(c)(2), (d)(2); Georgia Great Southern Division—Abandon. & Discontin. of Service, 6 S.T.B. 902, 906 (2003) (Georgia Great Southern). In short, a railbanked line is not abandoned, but remains part of the national rail system, albeit temporarily unused for railroad operations. An interim trail use

arrangement is subject to being cut off at any time by the reinstatement of rail service. If and when a railroad wishes to restore rail service on all or part of the property, it has the right to do so, and the trail sponsor must step aside. Georgia Great Southern; 16 U.S.C. 1247(d).

\* \* \*

[T]he right to reactivate a railbanked line is not an exclusive right. See, e.g., Iowa Power.

King County. The King County decision further noted that even where the opportunity to provide rail service is transferred by the abandoning railroad, such transfer would not preclude any other service provider, including any railroad, from seeking Board authorization to restore active rail service on all or parts of the rail banked segments in the future. King County; see 16 U.S.C. § 1247(d). And as noted above, here, UP retains the right to consent to the restoration of freight service on the Subject ROW.

As such, METRO's request for retroactive authority to acquire certain of the rights transferred to it by UP in 2001 and 2008, FBCTRA's request for authority to acquire those rights from METRO, and the parties' joint request to vacate and reissue the NITU and CITU covering the Subject ROW to reflect FBCTRA as the interim trail user are subject to the restrictive covenant set forth in the Vesting Deeds and confirmed in the Interim Trail Use/Rail Banking Agreements and Assignments and Deeds Without Warranty, which covenant prohibits use of the Subject ROW for freight rail service except with prior written consent of UP.<sup>3</sup>

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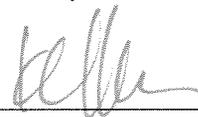
<sup>3</sup> By their filings, METRO and FBCTRA do not take the position that UP has waived its rights under law to reinstate rail service. UP retains and has not waived by agreement the right to reinstate common carrier by railroad freight operations in the future, if needed, on all or any portions of the line at issue in the above-captioned proceedings. In connection with any such restoration of railroad freight operations, however, UP will be obligated to pay the property owner for the use of the railroad easement and for all capital costs and expenses to the property owner's existing facilities in or adjacent to the railroad easement.

CONCLUSION

METRO and FBCTRA request that the Board note this Clarification on the records for the above-referenced dockets.

Further, in light of the restrictive covenant set forth in the Vesting Deeds and the Interim Trail Use/Rail Banking Agreements and Assignments and Deeds Without Warranty, METRO and FBCTRA respectfully request that the Board ensure that UP receive service of any and all future pleadings or documents filed in the above-referenced dockets.

Respectfully submitted,



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Dated: November 10, 2014

**Certificate of Service**

I hereby certify that on November 10, 2014, I served a copy of the foregoing

*Clarification* by first class mail, postage prepaid on the following:

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